87-109

No. _____

Supreme Court, U.S.
FILED
JUL 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

BILL ROSS CREAMER,

Petitioner,

v.

MICHAEL S. RAFFETY, *et al.*,

Respondents.

Petition For Writ of Certiorari to the Court of Appeals of the State of Arizona

PETITION FOR WRIT OF CERTIORARI

DAVID RUDOVSKY
KAIRYS & RUDOVSKY
924 Cherry Street
Suite 500
Philadelphia, Pa. 19107
(215) 925-4400

Attorney of Record
For Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988 requires a trial court to state reasons for an award of fees that is substantially less than requested by a prevailing plaintiff in a civil rights action.

PARTIES TO THE PROCEEDINGS

Petitioner, who was plaintiff below, is Bill Ross Creamer.

Respondents, who were defendants below, are Michael S. Raffety, Jean Raffety, Huey Lee Morris, Ruth Ann Morris, and City of Willcox.

TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari to the Court of Appeals for the State of Arizona	1
Opinion Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	
The Decision Of The Court Of Appeals Of Arizona Is In Conflict With The Applicable Decisions Of This Court And Of The Federal Circuit Courts Of Appeals, With Regard To The Proper Interpretation Of 42 U.S.C. § 1988	8
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES CITED

Cases

	Pages
Blum v. Stenson, 465 U.S. 886 (1984)	11
City of Riverside v. Rivera, — U.S. — (1986)	10
Creamer v. Raffety, 145 Ariz. 34, 699 P.2d 908 (1984)	5
Crumbaker v. Merit Systems Protection Brd., 781 F.2d 191 (1986)	11
Davis v. City of Abbeville, 633 F.2d 1161 (5th Cir. 1981)	11
Gaines v. Dougherty Cy. Bd. of Education, 775 F.2d 1565 (11th Cir. 1985)	11
Greer v. Holt, 718 F.2d 206 (6th Cir. 1983)	11
Hensley v. Eckerhart, 461 U.S. 424 (1983)	9
Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)	6, 9
Jordan v. Multnomah Cy, 799 F.2d 1262 (9th Cir. 1986)	11
Lucero v. Trinidad, 815 F.2d 1384 (10th Cir. 1987)	11
Mammamo v. Pittston Co., 792 F.2d 1242 (4th Cir. 1982)	11
Murphy v. Kolovitz, 635 F.2d 662 (7th Cir. 1981)	11
Northcross v. Bd. of Education of Memphis, 611 F.2d 624 (6th Cir. 1979)	12
Pennsylvania v. Delaware Citizens' Council for Clean Air, 55 LW 5113 (June 26, 1987)	6, 10, 11
Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978)	11
Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986)	12
Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983)	11

TABLE OF AUTHORITIES CITED—Continued

Pages

Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) 11

Walje v. City of Winchester, 773 F.2d 729 (6th Cir. 1985) 11

OTHER AUTHORITIES

28 U.S.C. § 1257 2

42 U.S.C. § 1988 ..... 2, 3, 5, 8

No. _____

In The
Supreme Court of the United States
October Term, 1986

BILL ROSS CREAMER,

Petitioner,

v.

MICHAEL S. RAFFERTY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI FOR THE PETITIONER, BILL ROSS CREAMER

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Bill Ross Creamer, plaintiff-appellant in the court below, respectfully prays that a writ of cer-

tiorari issue to review the judgment of the Court of Appeals of the State of Arizona entered in this case on December 26, 1986, affirming the trial court's decision on the issue presented. A Petition for Review was denied by the Arizona Supreme Court on March 24, 1987.

OPINION BELOW

The opinion of the Court of Appeals of Arizona is reproduced at page 2a in the Appendix. The opinion of the Superior Court of Arizona is reproduced at page 7a of the Appendix.

JURISDICTION

The Supreme Court of Arizona denied review of this case on March 24, 1987. On June 2, 1987 Chief Justice William H. Rehnquist granted a Motion For Extension of Time to file this petition to July 22, 1987.

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988:

Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

—o—

STATEMENT OF THE CASE

Petitioner commenced this civil rights case in 1980 by filing an action for damages and equitable relief in the Arizona Superior Court. The action presented claims under 42 U.S.C. § 1983 and related state causes of action.

Petitioner claimed that he had been unlawfully arrested, maliciously prosecuted, denied timely bail, subjected to an improper strip search, and denied due process of law

with respect to an incident that occurred on January 28, 1980 in the City of Willcox, Arizona.

At about 1 a.m. on that date petitioner was a passenger in an automobile that was stopped by the police because they suspected the driver of driving while intoxicated. Petitioner was arrested when he questioned the officer's right to conduct a search of the automobile and for his refusal to stand at a distance from the car. He was charged with obstructing a police officer, a misdemeanor under a City ordinance.

Petitioner was not searched or frisked at the scene. He was handcuffed in such a manner as to cause severe marks and bruises. At the police station, petitioner was subjected to a strip search and visual body cavity inspection under a policy requiring such searches for *all* in-coming prisoners regardless of the charges or any other factors. The search was conducted on a cold cement floor and caused petitioner humiliation and mental anguish.

Because the City of Willcox had failed to establish a bail schedule for violations of City ordinances such as the charge against petitioner (a schedule existed for all other criminal charges) and because the police interfered with petitioner's attempt to contact his family, petitioner was forced to spend the night in custody. He was released the next morning.

On April 2, 1980 petitioner was convicted in magistrate's court, but on trial *de novo* in the Superior Court of Arizona he was acquitted of all charges.

In his civil rights action, petitioner challenged the arrest, strip search, denial of release on bail, and the prosecution. The trial court granted summary judgment to the

defendants on the malicious prosecution claim and at trial granted directed verdicts against petitioner on all other counts.

On appeal, the Court of Appeals reversed in part and remanded for a new trial. *Craemer v. Raffety,* 145 Ariz. 34, 699 P.2d 908 (1984). The court ruled that the strip search policy was unconstitutional and directed that the lower court issue an injunction requiring the City to limit the circumstances under which such searches could be conducted. The court also remanded for trial petitioner's claims based on the failure to have a bail schedule for this offense and for the defendants' arbitrary interference with petitioner's attempts to contact his family to secure release on bail. According to the Court of Appeals, this claim presented valid due process and equal protection issues. 699 P.2d, at 917.

On remand, the trial court granted declaratory and injunctive relief on the strip search claim. The damages claim was settled for an amount of $5,250.00

Petitioner thereupon filed a Motion for Attorney's Fees and Costs under 42 U.S.C. § 1988 that, as supplemented, requested the following:

1.	Attorney's fees 464.8 hours at $90 per hour, plus 50% contingency multiplier	$69,720.00
2.	Paralegal fees 89.5 hours at $30 per hour	$ 2,685.00
3.	Costs	$ 6,140,81
	TOTAL	$78,545.81

In support of this motion, petitioner submitted a detailed affidavit of counsel's time, records, and bills.

Defendants opposed the request arguing first, that no fee was appropriate, and second, that if a fee was to be awarded, it should be far less than claimed by petitioner. Litigation of the motion included the testimony of petitioner's counsel, Tony K. Behrens, and two attorneys who testified as experts for the defendants.

The trial court, after hearing, awarded counsel fees and costs in the amount of $15,000.00.[1] No reasons were provided for awarding less than one-fourth of the fee request. The court did not find that the hours expended or the hourly rate were excessive; rather, the trial court adopted a "Proposed Form of Judgment" submitted by the respondents, which in boilerplate fashion stated that the court had considered the legal factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and that it would award $15,000 in attorney's fee. A. 7a-8a.

On appeal, the Court of Appeals affirmed the award (as amended to include taxable costs and expenses) and rejected petitioner's claim that the trial court had erred in failing to state reasons for its ruling. The Court of Appeals ruled that where a fee was denied "altogether," reasons must be given, but where a fee is awarded, even if

---

[1]Since no reasons were given for the fee award, it is impossible to determine whether the trial court rejected petitioner's requested enhancement on the contingency factor. This factor was cited by the court, A. 7a, and if this case is remanded the state courts would have to consider this issue in light of *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 55 LW 5113 (U.S., June 26, 1987)

far less than requested, "the trial court is not required to state reasons in support of the award." A. 4a-5a.

The Court of Appeals quite clearly ruled that *no* reasons had been provided by the trial court. A. 4a. Accordingly, the issue is properly before this Court on this very specific legal question. Respondents made an argument below that reasons in fact were provided. First, it was asserted that while the matter was pending, the Court of Appeals directed the trial court to clarify whether, "out-of-pocket expenses were allowed either as costs or otherwise." In response, the trial court purported to state reasons for its fee award. Procedurally, this addition to the record was not proper (since not requested by the Court of Appeals). More important, it was not given any mention or weight by that court. The Court of Appeals decision is based on the understanding that no reasons were provided. In addition, the reasons given are not, we submit, sufficient to meet the requirements under § 1988.

Second, respondents pointed to remarks made by the trial court at the close of the evidentiary hearing. At that point the trial judge merely stated that in light of the nature of the case he was troubled by the amount requested, but that he would probably grant some part of the request. Hearing, Dec. 24, 1985, pp. 87-88. Obviously, these comments during a hearing are not the kind of reasons required by § 1988.

The Supreme Court of Arizona denied review on March 24, 1987. On June 2, 1987, Chief Justice Rehnquist extended the date for filing the Petition for Certiorari to July 22, 1987.

———o———

REASONS FOR GRANTING THE WRIT

The Decision Of The Court Of Appeals Of Arizona Is In Conflict With The Applicable Decisions Of This Court And Of The Federal Circuit Courts Of Appeals With Regard To The Proper Interpretation Of 42 U.S.C. § 1988.

One important issue is presented for this Court's consideration: whether the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988, requires a trial court to state reasons in support of a decision awarding or denying fees to a prevailing plaintiff.

In this case, petitioner was clearly the prevailing party. He succeeded in obtaining a leading appellate court decision requiring a fundamental Constitutional change in strip search and bodily cavity searches procedures in Arizona. In addition, he received compensation by way of a settlement for the damages occasioned by the strip search and by his post-arrest incarceration.

Petitioner's Motion for Attorney's Fees was seriously contested with regard to the hours expended, the appropriate hourly fee, and the applicability of a contingency enhancement. The trial court expressly found that petitioner was entitled to a fee award, noting that "they did prevail. They did change the status of the law in this State." Hearing, Dec. 24, 1985, p. 88. However, after hearing, the trial court made an award of less than one-fourth of that requested by petitioner, and the court failed to provide a single reason for its decision. This action was sustained on appeal; accordingly, unless reviewed by this Court, in civil rights actions in Arizona state courts, trial courts will be under no obligation to provide reasons in ad-

judicating fee requests under § 1988. This clearly erroneous ruling conflicts with the decisions of this Court and of the Federal Circuit Courts of Appeals.

This Court has made it clear that in exercising its discretion under § 1988, the trial court must provide reasons for its decision. In *Hensley v. Eckerhart,* 461 U.S. 424 (1983) the Court set forth the basic framework for awarding fees. First, the "party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." *Id.* at 433. Based on this evidence, and any other records or evidence in the case, the court should determine the fee by multiplying the reasonable number of the hours expended by a reasonable hourly fee.

Second, this amount may be adjusted depending on the factor of "results obtained," *id.* at 434, which comes into play most often where a plaintiff has prevailed on less than all of the litigated claims. In making this determination the court may consider the twelve factors of *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), but no precise rule or formula is mandated for all cases.

Third, the trial court has discretion in determining the amount of a fee award, but in exercising this discretion the court must articulate its rationale:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. *It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award.* When an adjustment is requested on the basis of either the exceptional or limited nature of

> the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained. *Hensley, supra,* at 437 (Emphasis added).

In *Hensley,* the Court remanded for a further hearing on the fee award, in part because the district court despite having made a "commendable effort to explain the fee award", *id.* at 438, had not adequately explained the relationship between the award and the actual level of success. The Court ruled that the issue of which claims were actually successfully litigated requires a statement of reasons that is not satisfied "by a mere conclusionary statement that this fee was reasonable in light of the success obtained." *Id.* at 439, n.15.

While *Hensley* contains the most explicit statement on this issue, this Court's decisions in other § 1988 cases also stress the significance of stated reasons in ruling on a fee award. In *City of Riverside v. Rivera,* — U.S. —, 106 S.Ct. 2686 (1986), the Court sustained a fee award in part because of the district court's specific fact findings on the issues of whether (1) the time claimed was reasonably expended, (2) whether the attorneys' performance entitled them to be compensated at prevailing market rates, and (3) whether the award should be adjusted to account for the fact that not all claims were successfully litigated. 106 S.Ct. at 2692-93.[2] See also *Pennsyl-*

---

[2]Justice Powell, concurring, stated that affirmance of the fee award was "required by the District Court's detailed findings of fact, which were approved by the Court of Appeals." 106 S.Ct. at 2698.

vania v. Delaware Valley Citizens' Council for Clean Air, 55 LW 5113 (June 26, 1987); *Blum v. Stenson*, 465 U.S. 886, 900 (1984) (any upward adjustment of fee based on claim that outcome was of great benefit to class must be based on specific finding of exceptional success).

The federal circuit courts of appeals are nearly unanimous in requiring district courts to state reasons in ruling on fee requests under § 1988 or analogous statutes. See, e.g., *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978); *Lucero v. Trinidad*, 815 F.2d 1384 (10th Cir. 1987); *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3rd Cir. 1983); *Mammamo v. Pittston Co.*, 792 F.2d 1242 (4th Cir. 1986); *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980); *Walje v. City of Winchester*, 773 F.2d 729 (6th Cir. 1985); *Greer v. Holt*, 718 F.2d 206 (6th Cir. 1983); *Murphy v. Kolovitz*, 635 F.2d 662 (7th Cir. 1981); *Jordan v. Multnomah Cy.*, 799 F.2d 1262 (9th Cir. 1986); *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565 (11th Cir. 1985); *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191 (Fed. Cir. 1986). But cf., *Davis v. City of Abbeville*, 633 F.2d 1161 (5th Cir. 1981).

The rationale of these cases is consistent with *Hensley*. Articulation of reasons is necessary to ensure that the standards mandated by this Court in determining fee awards are followed and that discretion is properly applied. Further, an order that does not provide for "a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision [does not] allow for [an] informed review of the Court's discretion." *Sargeant v. Sharp, supra*, at 647. See also *Ursic v. Bethlehem Mines, supra*, at 675; *Van Ooteghem v. Gray*, 628 F.2d 488, 497 (5th Cir. 1980) ("absent spe-

cific findings by the district court . . . appellate review of the reasonableness of the fee award becomes a task of sheer speculation."); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141-42 (9th Cir. 1986). In *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 632 (6th Cir. 1979), the court stated that:

> . . . both the court's findings and its mode of analysis must be clear to enable an appellate court to intelligently review the award. The plaintiffs are entitled to some explanation of the reasoning used to exclude those hours . . . and some description of the findings relied upon to find that expenses and billing rates were excessive. Any review of the court's awards in this case would require . . . sheer conjecture on our part as we speculate as to reasons why the court might have cut certain documented hours. In fact, it is impossible to tell whether the district judge might not have simply overlooked certain services provided by plaintiffs' attorneys. Certainly no more substantial reason appears in this record.

In this case, petitioner prevailed on appeal on a major issue under the Fourth Amendment, thus limiting the circumstances under which the Arizona police can strip search arrestees. This ruling resulted in an injunction and a new state wide rule of law. A. 9a. Further, petitioner received by way of a settlement $5,250 in damages for his constitutional claims. And while he did not prevail on all of his claims, the record on the attorney's fee motion, including counsel's affidavit and deposition, would surely justify the full fee requested. There is absolutely no way of determining whether the trial court applied the proper standards in reaching its decision. Further, it is not possible to determine which hours may have been discounted or whether the hourly fee was considered ex-

cessive. For all the record shows, this award may have been based solely on the theory of proportionality, an approach which was rejected in *City of Riverside v. Rivera, supra.*

This is not to say that based on other evidence before the Court, that the fee request could not be reduced in some respects under the *Hensley* standards. But the court does not meet its responsibilities under *Hensley* by merely holding a hearing and then stating that it has considered the *Johnson Express* factors. It must also provide some reasons for its action, particularly when it reduces a facially valid request by over 75%.

We do not suggest that unnecessarily detailed fact findings or reasons must be given; rather, the court should give reasons sufficient to demonstrate it has considered the evidence in light of the standards under § 1988, that it has in fact applied the proper standards, and that in making the award it has properly determined the appropriate hourly rate, reasonable time expended, and any other factors cognizable under the statute. The decision should state why the award is less than the fee requested.

A grant of certiorari and reversal is particularly important in this case, where a federal civil rights claim was litigated in state court.[3] To ensure that the state courts properly adjudicate fee requests under § 1988 it is

---

[3]The Arizona Court of Appeals noted that it had previously required a trial court to give reasons when it denied a fee award altogether. A. 4a. But the difference between denying a fee and the kind of substantial reduction made in this case is wholly arbitrary.

important that the decision of the Arizona Court of Appeals be expressly repudiated. An increasing number of these cases are being heard by the state courts and it is critical that they adhere to the standards which govern attorney's fee litigation in such cases.

CONCLUSION

For all of the foreging reasons, it is respectfully requested that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Arizona.

Respectfully submitted,

David Rudovsky
Kairys & Rudovsky
924 Cherry Street
Suite 500
Philadelphia, Pa. 19107
(215) 925-4400

Attorney of Record
For Petitioner

APPENDIX

TABLE OF CONTENTS

Decision of Arizona Court of Appeals, December 26, 1986 ..... 2a

Judgment, Superior Court of Arizona, March 17, 1986 ..... 7a

Final Declaratory Judgment and Permanent Injunction, Superior Court of Arizona, July 1, 1985 ..... 9a

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BILL ROSS CREAMER,	)	2 CA-CV 5761
	)	Department B
Plaintiff/Appellant,	)	
	)	*MEMORANDUM*
v.	)	*DECISION*
	)	Not for
MICHAEL S. RAFFERTY,	)	Publication
JEAN RAFFERTY, HUEY	)	Rule 28(a)(2),
LEE MORRIS, RUTH ANN	)	Rules of Civil
MORRIS, and CITY OF	)	Appellate
WILLCOX,	)	Procedure
	)	
Defendants/Appellees.	)	(Filed December
	)	26, 1986)

APPEAL FROM THE SUPERIOR COURT
OF COCHISE COUNTY

Cause No. 39687

Honorable James L. Riley, Judge

AFFIRMED AS MODIFIED

BEHRENS & DESENS
by Tony K. Behrens — Bisbee

Attorneys for Plaintiff/Appellant

MESCH, CLARK & ROTHSCHILD, P. C.
by Tom R. Clark — Tucson

Attorneys for Defendants/Appellees
Rafferty and Morris

RIDENOUR, SWENSON, CLEERE & EVANS
by Michael J. Frazelle
and Thomas E. Weland — Phoenix

Attorneys for Defendant/Appellee
City of Willcox

LACAGNINA, Judge.

Bill Ross Creamer filed a civil rights action for damages arising out of a strip search conducted in connection with his arrest in Willcox, Arizona. The complaint, filed pursuant to 42 U.S.C. § 1983, also sought to enjoin the City of Willcox from enforcing its strip search policy and asserted various other claims. After this court rendered its decision in *Creamer v. Rafferty*, 145 Ariz. 34, 699 P.2d 908 (App. 1984), the parties settled the case except for Creamer's claim of $64,000 for attorneys' fees. Trial of that claim to the court resulted in an award of $15,000 for fees, expenses and costs.

Creamer asks in this appeal that we remand the case to the trial court for a statement of the reasons for the amount of the award. In the alternative he asks that we increase the trial court judgment by approximately $64,000, the amount requested in the trial court. Prior to our consideration of this appeal, we ordered the trial court to enter findings showing the specific amounts of costs and fees included in its $15,000 award. In its Minute Entry response, the trial court stated that the $15,000 was an award of attorneys' fees only and that although it had intended to award reasonable costs and expenses in addition to those attorneys' fees, it inadvertently failed to do so in the March 17, 1986 judgment. We affirm the findings of the trial court as amended to include taxable costs and expenses.

Creamer first argues that the trial court failed to state its reasons for the amount of attorneys' fees awarded as required by 42 U.S.C. § 1988. He relies on *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881 (App. 1985), *cert. denied*, 106 S.Ct. 397; however, *Moran* is distinguishable

from the instant case. In *Moran* the trial court denied fees altogether, and this court held that the judge should have given the reasons for such denial. We reaffirm that ruling. However, where more than nominal fees are awarded, we hold that the trial court is not required to state reasons in support of the award.

In the case at issue, the trial court did award attorneys' fees to Creamer, the prevailing party. In its judgment, the trial court stated that it had considered:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The judgment also stated that the court had presided over the initial trial of the matter; considered this court's decision on appeal; reviewed the file, motions, memoranda and certain depositions, and heard testimony in support of and in opposition to the motion for attorneys' fees. Although these statements do not constitute reasons for the amount of the award, they are matters the trial court should have considered in determining that amount. *See City of Riverside v. Rivera*, — U.S. —, — n.3, 106 S.Ct. 2686, 2691 n.3, 91 L.Ed.2d 466, 475 n.3 (1986), *citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th

Cir. 1974). This recitation is sufficient. The trial court is not required to quantify each factor in order to show how it arrived at the amount of the award. *See City of Riverside v. Rivera, id.* This would be a waste of judicial time and, in some cases, nearly impossible. The record need only reflect that there was sufficient evidence under the applicable law to support the court's determination.

We find that there was substantial evidence to support the trial court's award. There is contrary evidence, but the trial court's findings are binding unless clearly erroneous, and we will not substitute our opinion for that of the trial court. *Higdon v. Evergreen International Airlines, Inc.,* 149 Ariz. 452, 453, 719 P.2d 1068, 1069 (1986); *Fleming v. Pima County,* 141 Ariz. 167, 168, 685 P.2d 1319, 1320 (App. 1984), vacated in part, 141 Ariz. 149, 685 P.2d 1301 (1984). Two experienced attorneys testified that they had reviewed the file and familiarized themselves with the legal work required. One testified that a maximum reasonable fee for Creamer's counsel would be $15,000, including work on appeal, and the second that $7,500 to $10,000 would be full, complete, adequate, and just compensation for Creamer's counsel.

The evidence offered by Creamer showed that his counsel had the case from 1980 through 1985; worked 478.6 hours on it; had billable time of 89.5 hours for a paralegal; and had a total of $6,172.72 in costs and expenses. The necessity of the hours claimed by the attorneys and paralegals was hotly contested. Both attorney witnesses testified that the amount of time claimed by Creamer's attorneys was unnecessary and unreasonable.

The amount of attorneys' fees to be awarded in civil rights litigation is within the sound discretion of the trial

court, *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and will not be disturbed absent an abuse of that discretion. *Rutherford v. Pitchess,* 713 F.2d 1416 (9th Cir. 1983). We find no abuse of that discretion in this case.

Since the trial court intended to award costs in addition to the $15,000 attorneys' fees, but the judgment failed to include costs, we amend the judgment of the trial court to include $4,007.26 for the costs and expenses which we have determined are properly taxable.

/s/ Michael A. Lacagnina
MICHAEL A. LACAGNINA, Judge

CONCURRING:

/s/ Lloyd Fernandez
LLOYD FERNANDEZ, Judge

/s/ Joseph M. Livermore
JOSEPH M. LIVERMORE, Presiding Judge

MESCH, CLARK & ROTHSCHILD, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701
Phone: (602) 624-8886

By: Tom R. Clark #9792
070.05/slr
Attorney for Defendants Raffety and Morris

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF COCHISE

BILL ROSS CREAMER, Plaintiff, vs. MICHAEL S. RAFFERTY, et al., Defendants.	NO. 39687 PROPOSED FORM OF JUDGMENT (Filed March 17, 1986)

The court having considered the Plaintiff's Motion For Award Of Attorneys Fees and Costs in the above-entitled matter and this court having presided over the initial trial of the matter; having considered the decision of the Court of Appeals; having reviewed the file, motions and memorandums in support of and in opposition to the motion for attorneys fees; having reviewed the depositions of Mr. Behrens and Mr. McDonald and heard testimony before the court in support of and in opposition of the motion for fees; having considered (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations

imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. IT IS THEREFORE

ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against the defendants and the court assess reasonable costs and attorneys fees in the amount of $15,000.00.

DONE IN OPEN COURT THIS 17th day of March, 1986.

/s/ James L. Riley
Honorable James L. Riley
Superior Court Judge
Cochise County-Division 3

SUPERIOR COURT OF ARIZONA
COUNTY OF COCHISE

BILL ROSS CREAMER,	)	
	)	No. 39687
Plaintiff,	)	
	)	FINAL
vs.	)	DECLARATORY
	)	JUDGMENT
MICHAEL S. RAFFERTY, et al.,	)	AND
	)	PERMANENT
Defendant.	)	INJUNCTION
	)	
	)	

This matter having come before the Court pursuant to Plaintiff's Motion for Entry of Final Declaratory Judgment and Permanent Injunction, and the Court having considered the respective positions of the parties and the decision of the Court of Appeals in Case No. 2 CA-CIV 4981, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the policy adopted by the City of Willcox and effective in 1980 regarding mandatory strip searches of all City Jail inmates is declared unconstitutional, as in violation of the Fourth Amendment to the Constitution of the United States.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City of Willcox be, and is hereby, permanently enjoined from engaging in any policy requiring the strip searching of all City Jail inmates, and henceforth any strip searches of Willcox City Jail inmates shall be in accordance with the following conditions:

1. No strip search is permissable of prisoners arrested for traffic violations, petty offenses or minor offenses (misdemeanors), or first offenders, unless reasonable suspicion exists that the person to be incarcerated may be carrying or concealing contraband.

Report Required: A memo shall be prepared whenever a prisoner is strip searched based on suspicion. The memo shall contain all facts present which gave rise to the suspicion. A person arrested for possession of marijuana, drugs or weapons charges shall meet the minimum suspicion requirements for a strip search. The memo shall contain a brief statement articulating all available details which give rise to suspicion or probable cause. A copy of the memo shall be stapled to the booking sheet and the original forwarded to the Chief of Police.

2. *Cavity Searches:* are prohibited without probable cause, a warrant, and then are to be conducted only by a physician at a medical facility.

3. *Definition of Contraband. Weapons:* pointed or sharpened instruments, club, or objects capable of inflicting bodily injury upon another. *Flammables:* poisonous or explosive material or device, or any kind of ammunition. *Narcotics:* intoxicant, depressant or stimulant including alcohol or alcoholic beverage. Any device, paraphernalia, or item which can be used for the injection, inhalation or absorption of drugs or medicines not prescribed by a physician and administered by a jail staff member. Any mask or item designation to alter the individual's appearance which could be used for escape.

4. Prisoners shall be advised prior to being assigned to trustee duty that they will be subject to strip searches.

5. Whenever possible single bunking is preferred. For example, segregation of felony from misdemeanor, convicted from pending trial, female away from male, and adult from juvenile.

6. No one shall be strip searched if there is no intent to introduce the prisoner into the city jail.

7. When it is expected that the prisoner will be booked and no other prisoner is in the cell, and the person is not arrested for drugs or weapons charges the prisoner will not be strip searched.

8. A pat down frisk will suffice for a search prior to placing prisoners in their cells.

9. All items other than underwear, pants and shoes without laces will be removed from prisoners.

IT IS THE FURTHER FINDING of the Court that there is no just reason for delay in the entry of final judgment as to this Declaratory Judgment and Permanent Injunction and entry of final judgment is hereby expressly directed as to such matters, pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure.

DATED this 1st day of July, 1985.

/s/ James L. Riley
Judge of the Superior Court

Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-109

In The
Supreme Court of the United States
October Term, 1987

BILL ROSS CREAMER,

Petitioner,

v.

MICHAEL S. RAFFETY, *et al.*,

Respondents.

Petition For Writ of Certiorari to the Court of Appeals of the State of Arizona

REPLY AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS RUSSELL CLARK
MESCH, CLARK & ROTHSCHILD, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701-1090
(602) 624-8886

Attorney of Record for Respondents Raffety and Morris

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the lower court, after holding two days of hearings and hearing evidence, abused its discretion in awarding Plaintiff $15,000.00 in attorney fees and $4,007.26 in costs.

PARTIES TO THE PROCEEDINGS

Petitioner, who was plaintiff below, is Bill Ross Creamer.

Respondents, who were defendants below, are Michael S. Raffety, Jean Raffety, Huey Lee Morris, Ruth Ann Morris, and City of Willcox.

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 4

The Lower Court Held Extensive Hearings On A Hotly Contested Request For Attorney Fees. The Lower Court Properly Considered All Of The Factors Required By Law And Awarded A Substantial Amount Of Attorney Fees And Costs To Petitioner. There Are No Special And Important Reasons For Granting The Writ. There Was No Abuse Of Discretion By The Trial Court 4

Conclusion 10

Appendix 1a

TABLE OF AUTHORITIES

Cases

	Pages
City of Riverside v. Rivera, — U.S. —, 106 Sup. Ct. Rptr. 2686 (1986)	6
Copeland v. Marshall, 641 F.2d 880 (1980)	9
Hensley v. Eckerhart, 461 U.S. 424 (1983)	5, 7, 8, 9
Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974)	1, 6
Rutherford v. Pitchess, 713 F.2d 1416 (9th Cir. 1983)	6
Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978)	7, 8

STATEMENT OF THE CASE

The Petitioner has omitted several important facts and has inaccurately suggested to the court that Petitioner below justified the full fee requested by way of affidavits and depositions.

This was a hotly contested matter, to say the least. Two full days of hearings were held on the 9th of December, 1985 and on the 24th of December, 1985. Transcripts of those proceedings were available to the appellate courts and they exceed 160 pages of testimony.

The lower court judge allowed a full evidentiary hearing and allowed the Petitioner's counsel to be heard. Petitioners did not choose to bring any experts of their own to testify in favor of the award and supplied the court with a proposed form of judgment that was silent as to the various factors the court considered in arriving at its final determination.

The trial court indicated that it was going to weigh all of the evidence it had heard and use the twelve factors cited in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and come up with a just decision in awarding Plaintiff's attorney's fees.

The trial court in awarding the $15,000.00 for attorney fees specifically held that it had considered the following:

1. The court's presiding over the initial trial of the matter.

2. The courts having considered the decision of the Court of Appeals.

3. The court having reviewed the file.

4. The court having reviewed the motions and memorandums.

5. The court having reviewed the deposition of Mr. Behrens (Petitioner's counsel).

6. The court having reviewed the deposition of Mr. McDonald (Respondents' expert).

7. The court having heard testimony (Mr. Lundquist, another Respondents' expert) before the court in support and in opposition to the motion for fees.

8. The court having considered the twelve factors set forth in the proposed form of judgment.

It is abundantly clear the lower court had more than adequate evidence before it contesting the Petitioner's request for attorney fees. The lower court obviously recognized the many factors that it needed to consider in awarding the fees and took time out in a busy superior court trial schedule to hold two full days of hearings on the matter.

There was no request for a finding of fact or conclusions of law ever made pursuant to the appropriate rules of Arizona Civil Procedure.

At the close of the hearings hotly contesting the fees, the court stated to counsel as follows:

> "I am going to weigh all this information and the twelve factors cited in the cases to come up with a just decision which will award something to Plaintiff. I don't expect it will be $80,000.00, but it will be something." Reporter's transcirpt, December 24, 1984, page 88.

This case was settled for a nuisance value of $5,250.00 filed in the form of an Offer to Confess Judgment so that the defense would not have to undergo further trial, attorney fees, and costs. Plaintiff then filed an Affidavit for Attorney Fees requesting approximately $80,000.00. The injuries to the Plaintiff were minor, he had some handcuff red rings around his wrists, and complained of emotional upset which he was basically over. He spent four to five hours one night in jail and his damages, if any, were minimal. Petitioners omit some of the facts which the lower court, in its discretion, heard in determining the amount of the fee award. Some of those additional facts are as follows:

1. The trial court, in holding two days of hearings, heard the testimony of two experienced lawyers in the handling of civil rights litigation. They were Mr. Lundquist and Mr. McDonald.

2. Both Mr. Lundquist and Mr. McDonald reviewed the entire matter and formed an opinion as to what would be a reasonable amount for attorney fees. Mr. Lundquist said $11,000.00 to $15,000.00 was reasonable and Mr. McDonald said $7,500.00 to $10,000.00 was reasonable.

3. Mr. Behrens, Petitioner's counsel, had never tried a civil rights litigation and had very little, if any, experience in court handling jury trials.

4. Petitioner's counsel asked to be reimbursed for travelling to and from a police misconduct seminar (over eleven hours) and totally inappropriate matters which were unusual and unnecessary in accordance with the expert testimony. Petitioner also hired a legal assistant who had

no prior experience to sit through the trial and charged for her hourly rate.

5. The trial court sent its supplemental Order to the appellate court on November 20, 1986 clarifying its award of attorney's fees and costs, 2a.

REASONS FOR DENYING THE WRIT

The Lower Court Held Extensive Hearings On A Hotly Contested Request For Attorney Fees The Lower Court Properly Considered All Of The Factors Required By Law And Awarded A Substantial Amount Of Attorney Fees And Costs To Petitioner. There Are No Special And Important Reasons For Granting The Writ. There Was No Abuse Of Discretion By The Trial Court.

The Petitioner's position seems to be that the court must discuss specifically each of the factors and give a detailed account of how it arrived at an amount that is less than the Petitioner's Affidavit. This is simply not the law and has never been the law in the United States or any court thereof.

There is no contention that the lower court in this matter failed to consider a necessary element in the award of attorney fees. The record clearly shows that the lower court did in fact consider all of the appropriate factors.

A party seeking an award for attorney fees has the burden of establishing "by clear and convincing evidence" that the time and effort claimed and expended was neces-

sary to achieve the results obtained. See *Hensley,* 103 S.Ct. at page 1943 (Berger, C.J. concurring).

Trial courts are busy enough throughout the United States. They should not be required to quantify each factor in order to show how they arrived at a specific amount of an award. As the Arizona decision indicates, this would be a waste of judicial time and in many cases nearly impossible. The record should, however, reflect that there was sufficient evidence under the applicable law to support the court's determination and that the court *considered* the necessary factors.

The *Hensley* decision likewise does not require a lower court to specifically identify the hours that it eliminated. This Court stated in *Hensley* as follows at 103 S.Ct. page 1941:

> "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success."

Therefore, it is clear that the lower court in our case did not need to specifically identify and discuss in detail the various factors, but it is only necessary that the court and record show that it both considered those factors and that there was adequate evidence to support a reduction. There has never been an allegation in this matter that the lower court did not have sufficient evidence to support a reduction or that the court failed to consider a factor it should have.

The lower court does not have to come up with any precise formula and in fact, the trial court can use a common sense approach and weigh the hours claimed against

its own knowledge, experience and expertise of the time required to complete similar activities. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974) at page 717.

In *Rutherford v. Pitchess,* 713 F.2d 1416 (9th Cir. 1983) the court held that a lower court does not have to discuss specifically all of the reasonings and each of the factors and itemize the particular amount. The court held that it was adequate if the lower court explains that it considered the factors in reaching its determination, but that there is no necessity to itemize the specific reasoning concerning those factors. In *Rutherford,* the 9th Circuit said at 713 F.2d page 1420 the following:

> "The district court . . . need not discuss specifically each of the twelve factors. It is sufficient if the record shows that the court *considered* the factors 'called into question by the case at hand and necessary to support reasonableness of the fee award'." (Emphasis added)

The Petitioner suggests the record in this case shows the lower court may have based its attorney fees on the theory of proportionality, an approach which was rejected by *City of Riverside v. Rivera,* 106 S.Ct. 2686 (1986). In the first place, the Respondents never argued proportionality and certainly if you have a $5,000.00 case with $15,000.00 to $20,000.00 in attorney fees and costs the record does not support a proportionality argument. The issue, as the court knows, in *City of Riverside v. Rivera, supra,* was whether or not an award of attorney fees is per se "unreasonable" if it exceeds the amount of damages recovered by the Plaintiff in the underlying civil rights action. In our case the Plaintiff's attorney was awarded attorney fees *three times the amount of damages*

recovered by the Plaintiff. Even though this case did have a contingency fee agreement in it (33 1/3 percent of the amount collected) the trial court obviously did not take the proportionality view. If it had, it could have awarded fees in an amount smaller than the $5,250.00 obtained by the Petitioner but the court did not choose to do so.

Based upon the record in this case there is no showing that the lower court's ruling was clearly erroneous. The lower court applied the factors announced in *Hensley* in calculating the fee award and the court did not abuse its discretion in awarding attorney fees, even though it awarded fees and costs in approximately four times the amount of the compensatory amount.

There is no question that the court demonstrated that it had considered the evidence in light of the appropriate standards and applied them in making its award in this matter. The court had before it the testimony of two qualified individuals who had many years of experience in handling these cases as opposed to the Petitioner's counsel who not only had no experience in civil rights litigation, had very little, if any, experience in trial matters. Petitioner cites the case of *Sargeant v. Sharp,* 579 F.2d 645 (1978) as support for their position. This case, like many of the cases cited, is not in point and the *Sargeant* decision is a case where the court remanded the case for an evidentiary hearing. In our case we had an evidentiary hearing on the issues of entitlement to the fees and the amount. Additionally, the *Sargeant* decision is a case where the lower court judge decided that since there was a contingency fee agreement and that since the attorney had al-

ready been paid something, that he was not entitled to any additional fees. In our case the lower court decided, obviously, that the Petitioner's counsel was entitled to three times the amount of the compensatory damages in awarding its reasonable attorney fees. Additionally, in *Sargeant* the court indicated at 579 F.2d at page 647 as follows:

> "The record does not support a finding that the court gave adequate consideration to either of the grounds forwarded as a possible basis for the award of fees."

Our record certainly supports the fact that the court gave adequate consideration and as a matter of fact held a hearing that lasted for two days with expert testimony, both for and against the amount of fees. In our case the transcript of the proceedings is replete with evidence of qualified experts in the area who testified the Petitioner's requested fees were not reasonable and the testimony further supports what a reasonable amount of fees should be for a case of this nature. None of the cases cited by the Petitioner are similar to the fact situation of our matter.

Hensley requires the fee applicant to exercise billing judgment because the hours he may seek compensation for must be reasonable. There is no question the lower court in this case had before it ample evidence that the billing judgment was not reasonable and that the hours spent were not reasonably expended on the litigation. There is no evidence whatsoever that the lower court abused its discretion and erroneously awarded three to four times more than the compensatory damages in both attorney fees and court costs.

Counsel for the Petitioner did not make a good faith effort to exclude from the fee request hours that were excessive and unnecessary. This was testified to by the experts at the two-day hearing and is well documented in the transcripts and depositions of both Mr. Lundquist and Mr. McDonald. Hours that are not properly billed to one's client are also not properly billed to one's adversary just because there is some statutory authority for them. *Copeland v. Marshall,* 641 F.2d 880 (1980).

In the case that we are dealing with there was a simple arrest, the defendant was strip searched and kept in jail for four to five hours. This is not a complex civil rights litigation involving numerous challenges to institutional practices or conditions. Certainly the facts of our particular case are also a far cry from the situation referred to in *Hensley,* 461 U.S. at 436.

The amount of attorney fees to be awarded in civil rights litigation is within the sound discretion of the trial court. The trial court in this case not only used its discretion in awarding fees to the Petitioner, but it also held two evidentiary hearings entitling the Petitioner to support his position. There was adequate evidence before the trial court that Petitioner's claim for attorney fees were excessive and unnecessary. The record supports the fact that the court considered the necessary and appropriate factors in rendering its decision.

———o———

CONCLUSION

For all of the above reasons it is respectfully requested this Court deny the issuance of a Writ of Certiorari as requested by Petitioners.

Respectfully submitted,

THOMAS RUSSELL CLARK
MESCH, CLARK & ROTHSCHILD, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701-1090
(602) 624-8886

Attorney of Record for Respondents Raffety and Morris

APPENDIX

TABLE OF CONTENTS

Findings and clarification of trial court, November 20, 1986 ..... 1a

SUPERIOR COURT OF ARIZONA
COUNTY OF COCHISE

BILL ROSS CREAMER,	)	
	)	No. 39687
Plaintiff/Appellant,	)	
	)	MINUTE ENTRY
vs.	)	ACTION
	)	
MICHAEL S. RAFFETY, et al.,	)	
	)	
Defendants/Appellees.	)	
	)	
	)	

PRESENT: ----------

As directed by the Order of the Court of Appeals, dated October 20, 1986, this Court enters the following findings in clarification of the award of attorneys fees and costs:

A thorough review of the billing sheets presented by counsel for Plaintiff indicated to the Court that an unusual amount of time had been expended by counsel in "research" efforts. It would seem to this Court that any attorney seeking to be paid $150.00 per hour for his services would already be sufficiently experienced and knowledgeable in the kind of case at issue that so many hours of preparatory research would not be required. Interestingly, counsel has asked to be reimbursed for time spent travelling to and from, and attending a "Police Misconduct" seminar held in Tucson on February 23, 1982 (3.50 hours for travel, and 7.50 hours for attendance.)

With these concerns in mind, the Court considered very carefully the evidence presented at the evidentiary hearings of December 9, 1985, and December 24, 1985, and the subsequently presented deposition of John W. McDonald. Most pursuasive to this Court was the evidence by Mr. McDonald and Robert E. Lundquist. Each attorney testified on the basis of their civil litigation experience. Mr. Lundquist particularly impressed the Court with his experience and familiarity with "1983 actions." It was the opinion of both attorneys, after a review of this entire case, that the amount of time spent by Plaintiff's counsel was unreasonable and unnecessary. Mr. Lundquist testified that half, or more, of the time claimed by Plaintiff's counsel was unnecessary. Mr. McDonald expressed his opinion that reasonable attorneys fees should be between $7,500 and $10,000, while Mr. Lundquist said that $11,000 to $15,000 was reasonable.

On the basis of all evidence presented, the Court selected the highest opinion figure given, that of Mr. Lundquist of $15,000, as the appropriate amount of the award for attorneys fees. It is not possible to go through the Plaintiff's billing sheets and designate each time item that is reasonable and each one that is not. However, this Court has an abiding conviction that the total amount of time spent and claimed by counsel for the Plaintiff was not necessary or reasonable, and therefore that the losing parties ought not to be required to pay the amount demanded.

In reviewing the Judgment signed by this Court on March 17, 1986, there is a provision for an award of $15,000, for both attorneys fees and costs. This is an error, and not noticed by the Court when it was signed.

It was the Court's understanding that the opinions given by Mr. Lundquist and Mr. McDonald were as to reasonable fees only. This Court intended to enter an award of $15,000 for attorneys fees, as well as an award for all reasonable costs and expenses.

Date: *November 20, 1986.*

James L. Riley
/s/ Judge of the Superior Court

Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-109

In The

Supreme Court of the United States

October Term, 1987

BILL ROSS CREAMER,

Petitioner,

v.

MICHAEL S. RAFFETY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

James W. Evans*
Michael J. Frazelle
Ridenour, Swenson, Cleere & Evans
2350 Valley Bank Center
201 North Central Avenue
Phoenix, Arizona 85073
(602) 254-2143

Attorneys for Respondent City of Willcox
*Counsel of Record for Respondent

August 14, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

PARTIES TO THE PROCEEDINGS

Petitioner, who was plaintiff below, is Bill Ross Creamer.

Respondents, who were defendants below, are Michael S. Raffety, Jean Raffety, Huey Lee Morris, Ruth Ann Morris, and City of Willcox.

TABLE OF CONTENTS

Page

Opposition to Petition for Writ of Certiorari 1

Opinion Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Restatement of the Case 3

Reasons for Denying the Petition 8

Summary of Argument 8

Argument 9

I. The Trial Court Did Provide a Concise and Clear Explanation of Its Decision Regarding the Fee Award 9

II. Substantial Evidence Existed to Support the Trial Court's Award 10

Conclusion 14

Appendix 1a

TABLE OF AUTHORITIES CITED

Page

CASES

Blum v. Stenson, 465 U.S. 886 (1984) 12

City of Riverside v. Rivera, — U.S. —, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) 7, 8

Creamer v. Rafferty, 145 Ariz. 34, 699 P.2d 908 (App. 1984) 4, 7

Davis v. City Abbeville, 633 F.2d 1161 (5th Cir. 1981) ... 11

Davis v. Murphy, 587 F.2d 362 (7th Cir. 1978) 12

Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984) 6

Hensley v. Eckerhart, 461 U.S. 424 (1983) 8, 10, 12

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 7, 8, 9

Lucero v. City of Trinidad, 815 F.2d 1384 (10th Cir. 1987) 10

Marek v. Chesney, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) 12

Moran v. Pima County, 145 Ariz. 183, 700 P.2d 881 (App. 1985) 11, 13

Murphy v. Kolovitz, 635 F.2d 662 (7th Cir. 1981) 11

Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) 10

Rutherford v. Pitchess, 713 F.2d 416 (9th Cir. 1983) 10

Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978) 8

Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986) 8

Ursic v. Bethlehem Mines, 719 F.2d 670 (3rd Cir. 1983) 9

Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) ... 9

Wisinski v. Ong, 94 Ariz. 123, 382 P.2d 233 (1963) 3

TABLE OF AUTHORITIES CITED—Continued

Page

OTHER AUTHORITIES

28 U.S.C. 1257 2
42 U.S.C. 1988 ..... 2, 3, 4, 8, 13
Rule 21(c), Rules of Civil Appellate Practice 5
Rule 28(a)(2), Rules of Civil Procedure 13
Rule 28(c), Rules of Civil Appellate Procedure 13
Rule 52(a), Arizona Rules of Civil Procedure 5, 12

No. 87-109

In The

Supreme Court of the United States

October Term, 1987

BILL ROSS CREAMER,

Petitioner,

v.

MICHAEL S. RAFFETY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The respondent, City of Willcox, defendant-appellee in the court below, respectfully prays that the Petition for Writ of Certiorari to the Court of Appeals for the State of Arizona docketed on July 18, 1987 be denied.

OPINION BELOW

The opinion of the Court of Appeals of Arizona is reproduced at page 2a in the Appendix. The judgment of the Superior Court of Arizona is reproduced at page 7a of the Appendix. The denial of the Petition for Review of the Arizona Supreme Court on March 24, 1987 is reproduced at page 9a in the Appendix.

———o———

JURISDICTION

The Supreme Court of Arizona denied review of this case on March 24, 1987. On June 2, 1987 Chief Justice William H. Rehnquist granted a Motion for Extension of Time for Petitioner to file his petition to July 22, 1987. The petition was docketed on July 18, 1987.

The jurisdiction of the Supreme Court was invoked by petitioner pursuant to 28 U.S.C. 1257.

———o———

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988:

Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vin-

dication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

RESTATEMENT OF THE CASE

The petitioner brought this action in early 1980 against the City of Willcox and two of its police officers alleging false arrest, false imprisonment, malicious prosecution, and violation of his constitutional rights pursuant to 42 U.S.C. § 1983. The trial court granted summary judgment for defendants on the malicious prosecution claim based upon Arizona case law of long standing, *Wisninski v. Ong,* 94 Ariz. 123, 382 P.2d 233 (1963), and granted plaintiff leave to amend the Complaint.

The Amended Complaint asserted, in a total of eleven counts, claims for false imprisonment, failure to inform

plaintiff of bail conditions, delay in bringing plaintiff before a magistrate, intentional infliction of emotional distress, invasion of privacy, Section 1983 claims with respect to each of the foregoing, and a claim for injunctive relief against the City of Willcox regarding its strip search policies. The trial court directed verdicts for defendants on all claims in the Amended Complaint at the close of the plaintiff's case-in-chief after a five-day jury trial.

In *Creamer v. Rafferty,* 145 Ariz. 34, 699 P.2d 908 (App. 1984), the Court of Appeals of Arizona affirmed in part and reversed in part, remanding for trial the Section 1983 claims relating to conditions for bail, emotional distress (cruel and unusual punishment), privacy issues regarding the strip search policy of the City of Willcox, and injunctive relief regarding the issue of the strip search policy. After remand, the trial court granted plaintiff's request for injunctive relief, IR 26,[1] and denied his Motion for Partial Summary Judgment on the remaining claims. IR 28. The matter was then set for a second trial on September 24, 1985. *Id.*

On September 3, 1985, the plaintiff accepted an Offer of Judgment on the remaining claims in the sum of $5,250.00. IR 30. The plaintiff's claim for attorneys' fees and costs of approximately $80,000.00 under 42 U.S.C. § 1988 was reserved by stipulation and, after extensive discovery and two evidentiary hearings, IR 32-65, the trial court awarded costs and attorneys' fees in the sum of $15,000.00 on March 17, 1986. IR 65 A. 7a-8a.

---

[1] IR = index of record, item number.

No request for findings of fact and conclusions of law was ever requested by the plaintiff or any other party. Pursuant to Rule 52(a) of the Arizona Rules of Civil Procedure such a request, to be properly and timely made, must be done prior to the evidentiary hearings involved. A review of the plaintiff's attorneys' fee application by the trial court, testimony at the evidentiary hearings and deposition testimony presented to the trial judge for his consideration reveal that excessive, unreasonable and unnecessary fees and costs were claimed. By way of examples, charges for two attorneys were claimed for the simple task of taking pictures of the jail facility at the City of Willcox, a charge directly to this case for the time spent and costs associated with attending an out-of-town seminar on civil rights law was attempted to be made, charges directly to this case for the costs associated with the purchase of library books was attempted, charges for legal research on issues not related to the case were attempted, and substantial charges for an inexperienced paralegal who merely sat in the courtroom during the trial were attempted to be claimed.

It was also claimed by the plaintiff's attorneys that they should be paid for fees and costs relative to the first appeal even though no proper and timely request for same was made pursuant to Rule 21(c) of the Rules of Civil Appellate Procedure.

The defendants presented the testimony of two expert witnesses regarding the unreasonableness of plaintiff's claim for fees. Robert E. Lundquist, an attorney who has practiced in Tucson for more than twelve years and handled Section 1983 cases for both plaintiffs and defendants

testified for defendant Raffety and Morris. TR I, pp. 5-7.[2] Mr. Lundquist gave the opinion that the plaintiff's fee application in this case was not reasonable in that one-half or more of the hours expended were unnecessary, and that the hourly rate was too high. TR I, pp. 10-11. Mr. Lundquist also testified that, based on his review of this case, a maximum reasonable fee for plaintiff's attorney would be $15,600.00. TR I, pp. 17-19.

John W. McDonald, an attorney who has also practiced for more than twelve years in Tucson, and tried more than sixty civil cases to conclusion, testified by deposition for the City of Willcox. (TR II, p. 87; deposition of John W. McDonald, pp. 9 and 10.) Mr. McDonald testified that a fee award to plaintiff's attorney in this case of between $7,500.00 and $10,000.00 would be just compensation. (Deposition at p. 21.) Mr. McDonald did not include in his fee calculation the value of any impact this case may have had on the strip search policies of the Willcox Police Department. (Deposition at p. 22.)

James E. Holland, Willcox city attorney, testified that the City Police Department implemented a new strip search policy six months prior to the injunction entered in this case, in December of 1984, and that the City did so in response to guidelines articulated in the case of *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984); TR II, pp. 18-20.

The plaintiff below then challenged the adequacy of the award of attorneys' fees in a second appeal. In this second

---

[2] TR I refers to the transcript of the evidentiary hearing of December 9, 1985.

TR II refers to the transcript of the evidentiary hearing of December 24, 1985.

appeal, the Arizona Court of Appeals affirmed the award (as amended to include taxable costs and expenses). The Court of Appeals indicated that the trial court did, in fact, award some fees to the plaintiff as a prevailing party and that, in the judgment itself, the trial court recited the facts that it had presided over the initial trial, considered the Court of Appeals decision in *Creamer v. Rafferty*, 145 Ariz. 34, 699 P.2d 908 (App. 1984), reviewed the court file, its motions, memoranda and certain depositions taken regarding the fees issue and heard testimony in support of and against the motion for fees. A. 7a-8a. The Court of Appeals also noted that the Judgment itself recited that the trial court had considered the twelve factors regarding the determination of amounts of reasonable attorneys' fees as set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). A. 4a. The Court of Appeals then held that such a recitation was sufficient and that the trial court was not required to quantify each factor in order to show how it arrived at the amount of the award and that the record need only reflect that there was sufficient evidence under the applicable law to support the award, citing *City of Riverside v. Rivera*, — U.S. —, —, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986). A. 4a-5a.

The plaintiff-petitioner now challenges the Court of Appeals' decision on the basis that the trial court allegedly did not adequately state reasons for a reduction of the award.[3]

---

[3] It should be noted that the plaintiff's proposed form of Judgment recited no basis for a fee award whatsoever. IR 66.

—o—

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The decision of the Court of Appeals of Arizona is not in conflict with the decisions of this Court nor of the Federal Circuit Courts of Appeals with regard to the proper interpretation of 42 U.S.C. 1988 with respect to whether a trial court must state reasons in support of its fee award decision. In *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), this Court reemphasized that trial courts have discretion in determining the amount of a fee award and that it remained important for trial courts to provide a concise but clear explanation of its reasons for the fee award. The rationale for such an explanation is to allow for an informed, appellate review, where necessary, of the trial court's use of its discretion. *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141-42 (9th Cir. 1986).

In this case, the Arizona Court of Appeals correctly ruled that the factors considered by the trial judge as enumerated in the Judgment were proper matters of consideration, citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). A. 4a. The Court of Appeals also correctly pointed out that the trial court was not required to quantify each factor in order to show how it arrived at the amount of the award, citing *City of Riverside v. Rivera*, — U.S. —, 106 S.Ct. 2686 (1986). A. 4a. Finally, the Court of Appeals correctly realized (and so indicated) that substantial evidence existed to support the trial court's award and that the award was not clearly erroneous. The Court of Appeals specifically stated that the record need only reflect that there was sufficient evidence to support the trial

court's determination and that such a record existed in this case. A. 5a. Therefore, the award of the trial court was capable of being informatively and intelligently reviewed by the appellate court.

———o———

ARGUMENT

I. THE TRIAL COURT DID PROVIDE A CONCISE AND CLEAR EXPLANATION OF ITS DECISION REGARDING THE FEE AWARD.

The trial court stated in its written Judgment that it had considered the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc., supra.* A. 7a-8a. The Judgment also generically enumerated the items of evidence and testimony considered. The Court of Appeals realized (and so stated) that the matters considered were ones that should have been considered in order to determine the amount of the fee award. A. 4a. The Court of Appeals then correctly held that the trial court's recitation was sufficient because it would be a waste of judicial time and, in some cases, impossible to quantify each factor in order to show how the amount of the award was determined. A. 5a.

The ruling of the Court of Appeals and its rationale is quite sensible and is also in conformance with the decisions of this Court and the Federal Circuit Courts of Appeals. The reason for any requirement at all that a trial court articulate reasons for its award or for providing an explanation for the award is to facilitate informed appellate review. *Ursic v. Bethlehem Mines,* 719 F.2d 670, 675 (3rd Cir. 1983); *Van Ooteghem v. Gray,* 628 F.2d 488, 497 (5th Cir. 1980).

In *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983), this Court stated:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained.

In this instant case, the trial court indicated in its Judgment that it considered all twelve of the *Johnson* factors including, of course, the amount involved and the results obtained. The reasons given by a trial court need not be so specific as to require individual justifications so long as the reasons given for the award as a whole are adequate to allow for meaningful review. *Lucero v. City of Trinidad,* 815 F.2d 1384, 1385 (10th Cir. 1987); see also, *Ramos v. Lamm,* 713 F.2d 546, 552 (10th Cir. 1983).

II. SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT THE TRIAL COURT'S AWARD.

Even if the trial court's Judgment regarding the fees awarded was not supported by an adequate recitation of reasons for the determination made, the record on appeal was sufficient to allow for informed appellate review.

In *Rutherford v. Pitchess,* 713 F.2d 416, 420 (9th Cir. 1983), it was stated that:

> "The district court . . . need not discuss specifically each of the twelve factors. *It is sufficient if the record shows that the court considered the factors* 'called into question by the case at hand and necessary to support reasonableness of the fee award.' " (Emphasis supplied.)

In *Davis v. City of Abbeville,* 633 F.2d 1161, 1163 (5th Cir. 1981), the Court found no necessity for remand of a fee award even where no articulation of the *Johnson* factors had occurred because the Court was unable to hold on the record before it that the trial court had failed or refused to consider the *Johnson* factors in making its award.

In *Murphy v. Kolovitz,* 635 F.2d 662, 664 (7th Cir. 1981), the Court, in determining the adequacy of a trial court's explanation when denying *in toto* an award of fees pursuant to 42 U.S.C. 1988, stated that although it agreed that a trial court must give reasons as to why it denies completely an award and must identify the "special circumstances" of the case leading to a denial of fees, the Court did not intend to say that the "special circumstances" must always be "neatly packaged and labeled on the record to avoid reversal if the 'special circumstances' are otherwise clearly and unarguably recognizable in the record as developed by the trial judge."

The Petitioner claims that the Arizona Court of Appeals has made a wholly arbitrary distinction when it requires trial courts to articulate reasons for denying a fee award altogether (as in *Moran v. Pima County,* 145 Ariz. 183, 700 P.2d 881 (App. 1985), *cert. den.,* 106 S.Ct. 397) and when, in this instant case, it does not require the trial court to articulate reasons for a substantial reduction in an award. However, the Petitioner fails to realize that ordi-

narily in Civil Rights Act cases the plaintiff, if he prevails, should be awarded reasonable fees "as a matter of course" absent special circumstances rendering them unjust. *Davis v. Murphy,* 587 F.2d 362, 364 (7th Cir. 1978); *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983); *Marek v. Chesney,* 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985).

In instances where the prevailing plaintiff receives some award more than a nominal one but much less than requested then so long as the record reflects adequately the legitimate reasons why such a substantial reduction was made then no harm whatsoever has befallen such a plaintiff. This is because the amount awarded will have been determined by the trial court to have been the "reasonable" amount allowable and any subsequent appellate review will be informed and meaningful because of the existence of the adequate record made, regardless of the fact that the trial court did not articulate in great detail the reasons for the reduction. This is especially true in a case where the plaintiff did not request in a timely manner pursuant to Rule 52(a) of Arizona Rules of Civil Procedure that detailed findings of fact and conclusions of law be made relative to the attorneys' fees and costs issues.

Thus, it is clear that when a trial court has awarded fees, the award should not be set aside or remanded for further consideration or articulation of reasons where the record shows that the court did consider the *Johnson* factors called into question by the case at hand necessary to support the reasonableness of the award or where the record fails to reveal or disclose that the court did not consider the appropriate factors. In *Blum v. Stenson,* 465 U.S. 886, 897 (1984), this Court stated that when the fee applicant has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is

presumed to be the reasonable fee contemplated by 42 U.S.C. 1988. The petitioner simply failed in carrying that burden and the record is replete with support for the trial court's ruling on this fee application. Even if the trial court had not stated any reason at all there would not be any need to remand this case because of the obvious explanations on the record for the substantial reduction in the fee requested. In that respect, this case is similar to the situation in *Moran v. Pima County, supra,* at p. 185 where the appellate court held the articulation of no reasons for a complete denial of fees was error but no remand was necessary in view of the obvious explanation that only one of four plaintiffs prevailed and that award was *de minimus.*

Finally, petitioner states that a grant of certiorari and reversal is particularly warranted because the federal civil rights claims were litigated in state court and the decision of the Arizona Court of Appeals should be expressly repudiated. (Petition at pp. 13-14.) In addition to the facts that the decision of the Arizona Court of Appeals is correct and is in conformance with the decisions of this Court and Federal Circuit Courts of Appeal, the decision rendered was in the form of a Memorandum Decision not for publication pursuant to Rule 28(a)(2), Rules of Civil Appellate Procedure. Therefore, the disposition in this case cannot even serve as precedent in other cases where federal civil rights claims are determined in Arizona's state courts because memoranda decisions, pursuant to Rule 28(c), Rules of Civil Appellate Procedure, are not regarded as precedent nor cited in any court except for the purposes of establishing the defense of *res judicata,* collateral estoppel or the law of the case. The "doom" the petitioner claims will occur as a result of this decision by the Court of Appeals is, therefore, wholly illusory.

CONCLUSION

Because the Arizona Court of Appeals' decision in this case is not in conflict with existing Federal Law nor with the decisions of this Court or those of the Federal Circuit Courts and, further, because the trial court, when determining the fee award, stated an adequate recitation of its reasons and a sufficient record existed for informed appellate review, Bill Ross Creamer's Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

JAMES W. EVANS*
MICHAEL J. FRAZELLE
RIDENOUR, SWENSON, CLEERE & EVANS
2350 Valley Bank Center
201 North Central Avenue
Phoenix, Arizona 85073
(602) 254-2143

Attorneys for Respondent
City of Willcox
*Counsel of Record for Respondent

APPENDIX

Decision of Arizona Court of Appeals, December 26, 1986 ..... 2a

Judgment, Superior Court of Arizona, March 17, 1986 ..... 7a

Denial of Petition for Review of the Supreme Court of Arizona 9a

APPENDIX

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BILL ROSS CREAMER,	)	2 CA-CV 5761
	)	Department B
	)	
Plaintiff/Appellant,	)	*MEMORANDUM*
	)	*DECISION*
v.	)	Not for
	)	Publication
MICHAEL S. RAFFERTY, JEAN RAFFERTY, HUEY LEE MORRIS, RUTH ANN MORRIS, and CITY OF WILLCOX,	)	Rule 28(a)(2), Rules of Civil Appellate Procedure
	)	
Defendants/Appellees.	)	(Filed December 26, 1986)

APPEAL FROM THE SUPERIOR COURT
OF COCHISE COUNTY

Cause No. 39687

Honorable James L. Riley, Judge

AFFIRMED AS MODIFIED

BEHRENS & DESENS
by Tony K. Behrens — Bisbee
Attorneys for Plaintiff/Appellant

MESCH, CLARK & ROTHSCHILD, P. C.
by Tom R. Clark — Tucson
Attorneys for Defendants/Appellees
Rafferty and Morris

RIDENOUR, SWENSON, CLEERE & EVANS
by Michael J. Frazelle
and Thomas E. Weland — Phoenix
Attorneys for Defendant/Appellee
City of Willcox

L A C A G N I N A, Judge.

Bill Ross Creamer filed a civil rights action for damages arising out of a strip search conducted in connection with his arrest in Willcox, Arizona. The complaint, filed pursuant to 42 U.S.C. § 1983, also sought to enjoin the City of Willcox from enforcing its strip search policy and asserted various other claims. After this court rendered its decision in *Creamer v. Rafferty*, 145 Ariz. 34, 699 P.2d 908 (App. 1984), the parties settled the case except for Creamer's claim of $64,000 for attorneys' fees. Trial of that claim to the court resulted in an award of $15,000 for fees, expenses and costs.

Creamer asks in this appeal that we remand the case to the trial court for a statement of the reasons for the amount of the award. In the alternative he asks that we increase the trial court judgment by approximately $64,000, the amount requested in the trial court. Prior to our consideration of this appeal, we ordered the trial court to enter findings showing the specific amounts of costs and fees included in its $15,000 award. In its Minute Entry response, the trial court stated that the $15,000 was an award of attorneys' fees only and that although it had intended to award reasonable costs and expenses in addition to those attorneys' fees, it inadvertently failed to do so in the March 17, 1986 judgment. We affirm the findings of the trial court as amended to include taxable costs and expenses.

Creamer first argues that the trial court failed to state its reasons for the amount of attorneys' fees awarded as required by 42 U.S.C. § 1988. He relies on *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881 (App. 1985), *cert. denied*, 106 S.Ct. 397; however, *Moran* is distinguishable

from the instant case. In *Moran* the trial court denied fees altogether, and this court held that the judge should have given the reasons for such denial. We reaffirm that ruling. However, where more than nominal fees are awarded, we hold that the trial court is not required to state reasons in support of the award.

In the case at issue, the trial court did award attorneys' fees to Creamer, the prevailing party. In its judgment, the trial court stated that it had considered:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The judgment also stated that the court had presided over the initial trial of the matter; considered this court's decision on appeal; reviewed the file, motions, memoranda and certain depositions, and heard testimony in support of and in opposition to the motion for attorneys' fees. Although these statements do not constitute reasons for the amount of the award, they are matters the trial court should have considered in determining that amount. *See City of Riverside v. Rivera*, — U.S. —, n.3, 106 S.Ct. 2686, 2691 n.3, 91 L.Ed.2d 466, 475 n.3 (1986), *citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th

Cir. 1974). This recitation is sufficient. The trial court is not required to quantify each factor in order to show how it arrived at the amount of the award. *See City of Riverside v. Rivera, id.* This would be a waste of judicial time and, in some cases, nearly impossible. The record need only reflect that there was sufficient evidence under the applicable law to support the court's determination.

We find that there was substantial evidence to support the trial court's award. There is contrary evidence, but the trial court's findings are binding unless clearly erroneous, and we will not substitute our opinion for that of the trial court. *Higdon v. Evergreen International Airlines, Inc.*, 149 Ariz. 452, 453, 719 P.2d 1068, 1069 (1986); *Fleming v. Pima County*, 141 Ariz. 167, 168, 685 P.2d 1319, 1320 (App. 1984), vacated in part, 141 Ariz. 149, 685 P.2d 1301 (1984). Two experienced attorneys testified that they had reviewed the file and familiarized themselves with the legal work required. One testified that a maximum reasonable fee for Creamer's counsel would be $15,00, including work on appeal, and the second that $7,500 to $10,000 would be full, complete, adequate, and just compensation for Creamer's counsel.

The evidence offered by Creamer showed that his counsel had the case from 1980 through 1985; worked 478.6 hours on it; had billable time of 89.5 hours for a paralegal; and had a total of $6,172.72 in costs and expenses. The necessity of the hours claimed by the attorneys and paralegals was hotly contested. Both attorney witnesses testified that the amount of time claimed by Creamer's attorneys was unnecessary and unreasonable.

The amount of attorneys' fees to be awarded in civil rights litigation is within the sound discretion of the trial

court, *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and will not be disturbed absent an abuse of that discretion. *Rutherford v. Pitchess,* 713 F.2d 1416 (9th Cir. 1983). We find no abuse of that discretion in this case.

Since the trial court intended to award costs in addition to the $15,000 attorneys' fees, but the judgment failed to include costs, we amend the judgment of the trial court to include $4,007.26 for the costs and expenses which we have determined are properly taxable.

/s/ Michael A. Lacagnina
MICHAEL A. LACAGNINA, Judge

CONCURRING:

/s/ Lloyd Fernandez
LLOYD FERNANDEZ, Judge

/s/ Joseph M. Livermore
JOSEPH M. LIVERMORE, Presiding Judge

MESCH, CLARK & ROTHSCHILD, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701
Phone: (602) 624-8886

By: Tom R. Clark #9792
070.05/slr
Attorney for Defendants Rafferty and Morris

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF COCHISE

BILL ROSS CREAMER, Plaintiff,	NO. 39687
vs.	PROPOSED FORM OF JUDGMENT
MICHAEL S. RAFFERTY, et al., Defendants.	

The court having considered the Plaintiff's Motion For Award Of Attorneys' Fees and Costs in the above-entitled matter and this court having presided over the initial trial of the matter; having considered the decision of the Court of Appeals; having reviewed the file, motions and memorandums in support of and in opposition to the motion for attorneys' fees; having reviewed the depositions of Mr. Behrens and Mr. McDonald and heard testimony before the court in support of and in opposition of the motion for fees; having considered (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. IT IS THEREFORE

ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against the defendants and the court assess reasonable costs and attorneys' fees in the amount of $15,000.00.

DONE IN OPEN COURT THIS 17th day of March, 1986.

/s/ .....
Honorable James L. Riley
Superior Court Judge
Cochise County-Division 3

(SEAL)

SUPREME COURT

STATE OF ARIZONA

201 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007 2866
Telephone (602) 255-4536

DAVID R. COLE
Clerk

DIANA K. BENTLEY
Chief Deputy Clerk

March 25, 1987

RE: BILL ROSS CREAMER vs. MICHAEL S. RAFFETY/JEAN RAFFETY/HUEY LEE MORRIS, et al.
Supreme Court No. CV-87-0084-PR
Court of Appeals No. 2 CA-CV-5761
Cochise County No. 39687

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 24, 1987, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Apeals, Division Two, Tucson, this 25th day of March, 1987.

DAVID R. COLE, Clerk

TO: Tony K. Behrens, Esq., Desens & Behrens, P. O. Box 87, Bisbee, AZ 85603

Tom R. Clark, Esq., Mesch, Clark & Rothschild, P.C., 259 North Meyer Avenue, Tucson, AZ 85701

Michael J. Frazelle, Esq., and Thomas E. Weland, Esq., Ridenour, Swenson, Cleere & Evans, 2350 Valley Bank Center, 201 North Central Avenue, Phoenix, AZ 85073

Joyce Goldsmith, Clerk, Court of Appeals, Division Two, 416 W. Congress, Tucson, AZ 85701

daw